U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20008913

Date: MAR. 17, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. We agreed with the Director and dismissed the Petitioner's appeal, additionally concluding that the Petitioner had not established that he satisfies the regulatory requirements for classification as a member of the professions holding an advanced degree. The Petitioner filed a combined motion to reopen and reconsider our decision dismissing the appeal. We dismissed the combined motion because it was untimely filed. The matter is now before us again on a combined motion to reopen and reconsider our previous decision to dismiss the combined motion. Upon review, we will dismiss the motions.

I. LAW

To establish eligibility for a national interest waiver, *a petitioner must first demonstrate qualification for the underlying EB-2 visa classification* (emphasis added), as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
>
> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or

> who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B) Waiver of job offer –
>
> > (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that *after a petitioner has established eligibility for EB-2 classification* (emphasis added), U.S. Citizenship and Immigration Services (USCIS) may, as a matter of discretion,[2] grant a national interest waiver if a petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

In order to show an individual is a professional holding an advanced degree, the petition must be accompanied by "[a]n official academic record showing that the [individual] has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, the Petitioner may present "[a]n official academic record showing that the [individual] has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that [the individual] has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

A motion to reconsider is based on an incorrect application of law or policy, and a motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

Under 8 C.F.R. § 103.5(a)(1) and 8 C.F.R. § 103.8(b), in general, motions must be filed within 33 days of the adverse decision. In response to the coronavirus (COVID-19) pandemic, however, U.S. Citizenship and Immigration Services (USCIS) has extended the deadline for filing a Form I-290B, Notice of Appeal or Motion. A petitioner may file a Form I-290B within 63 calendar days from the date of the adverse decision, if USCIS issued the decision between March 1, 2020, and January 15,

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[2] *See also Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

2022.[3] As relating to a motion to reopen the proceeding, the filing deadline may be excused in the discretion of USCIS if a petitioner demonstrates that the delay was reasonable and was beyond their control. 8 C.F.R. § 103.5(a)(1). The regulations provide no corresponding discretion to excuse an untimely motion to reconsider.

II. ANALYSIS

We dismissed the Petitioner's appeal on December 22, 2020.[4] We received the Petitioner's previous motions on February 24, 2021, more than 63 days after we dismissed the appeal. In support of the instant motions, the Petitioner presents a U.S. Postal Service (USPS) receipt indicating that he mailed his previous motions on February 16, 2021, utilizing "priority overnight service." The USPS receipt shows that the expected delivery date was February 17, 2021, but the motions did not arrive at USCIS until February 24th, after the filing deadline. The Petitioner asserts that the mailing delay was reasonable and was due to USPS shipping delays that were beyond his control. The Petitioner asserts that he "exercised reasonable diligence" in filing the prior motions and indicates that he disagrees with our decision to dismiss them as untimely. We will dismiss the motions.

A. Motion to Reconsider

The Petitioner asks that we "approve this motion in [our] discretionary authority. . . ." contending that "[s]hort delays in the mail are not a ground to summarily dismiss[] an appeal without reconsidering reasonable explanation and unintentional delays beyond petitioner's control and not fault." The issue to be determined in this motion to reconsider is whether we erred in dismissing the Petitioner's previous untimely motions. As noted above, USCIS regulations do not provide discretion to excuse an untimely motion to reconsider. *See AAO Practice Manual*, Ch. 4.62(c), https://www.uscis.gov/aao-practice-manual. Therefore, we did not err in dismissing the prior motion as untimely, and we will also dismiss the instant motion to reconsider.

B. Motion to Reopen

In support of his motion to reopen, the Petitioner asserts that his delay in filing the motion "was unavoidable and not within the control of the Petitioner but rather [due to] some administrative or other error by [USPS]." We may grant a motion to reopen if it satisfies the requirements collectively enumerated in 8 C.F.R. § 103 and demonstrates eligibility for the requested immigration benefit.

We have considered the evidence provided in support of the instant motion and the previous untimely motions and conclude that exercising our discretion to grant the motion to reopen is not warranted in this case. Specifically, even if we were to excuse the late filing of the motion to reopen, the evidence provided on motion does not establish that the Petitioner qualifies for the EB-2 classification as a member of the professions holding an advanced degree.[5] Here, the Petitioner has not presented new facts on motion to establish that at the time he filed the petition, he satisfied the regulatory requirements for the EB-2 classification. Rather, he contends that based on previously submitted

[3] *USCIS Extends Flexibility for Responding to Agency Requests*, available at https://www.uscis.gov/newsroom/alerts/uscis-extends-flexibility-for-responding-to-agency-requests.

[4] *See* our previous decision dismissing the appeal at ID# 8468042 (AAO DEC. 22, 2020).

[5] The Petitioner does not contend, nor does the record establish that he is eligible for the EB-2 classification as an individual of exceptional ability. *See* 8 C.F.R. § 204.5(k)(2).

evidence, he "has provided enough documentation of his eligibility including [his] official academic records and letters from his past and current employers demonstrating his progressive work experience in the field." Importantly, the Petitioner's general reference to evidence submitted prior to the filing of the motions does not meet the requirements of a motion to reopen as set forth at 8 C.F.R. § 103.5(a)(2).

As discussed in our decision dismissing the appeal which we incorporate herein, the Petitioner filed the petition on October 15, 2018. He obtained a bachelor of science degree in business administration from [S-] College in the Philippines in March 2014, *less than five years* prior to the filing of the petition. Even if the Petitioner established that his foreign bachelor's degree is equivalent to a U.S. baccalaureate degree (which is not sufficiently evidenced in the record), he has not demonstrated *at least five years* of progressive *post-baccalaureate* experience in his specialty at the time he filed the petition. The Petitioner must establish eligibility at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

For the foregoing reasons we decline to extend our discretion to excuse the Petitioner's untimely filed motions as the Petitioner has not demonstrated eligibility for the requested immigration benefit. Moreover, we will not further address the Petitioner's evidence on motion regarding our remaining basis to dismiss the Petitioner's appeal, which focuses on whether the Petitioner is eligible for a national interest waiver. There is no constructive purpose in addressing it because it does not change the outcome of the motion.[6]

ORDER: The motion to reconsider is dismissed.

FURTHER ORDER: The motion to reopen is dismissed.

[6] See *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); see also *Matter of L-A-C-*, 26 I&N Dec. 516,526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).